IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 792 OF 2005

MRS. KUSUM KAPOOR .. PETITIONER

Versus

CHICO De SOUZA & ANR. .. RESPONDENT

Mr. G. S. Godbole with O.P. Soni i/b M/s. O.P. Soni & Co. for petitioner

Smt. Ranjana Parikh for R

CORAM:-SMT. RANJANA DESAI, J.

DATED:-23-3-2005

P.C.:

The petitioner is original defendant 2. Respondent 1 is the plaintiff/landlord and respondent 2 is the original defendant 1.

2. The petitioner-defendant 2 has challenged in this writ petition concurrent finding of fact recorded by the courts below that the plaintiff has proved that defendant 1 has failed and neglected to pay arrears of rent for more

than six months from 1/2/1976 onwards inspite of demand notice served on him.

3. The case of the plaintiff is that the plaintiff is the owner of the suit premises. Leave and Licence agreement was entered into by the plaintiff with one M/s. Mass Communication and Marketing Pvt. Ltd. ("the company" for short). Monthly compensation was Rs.375/-. The company was licensee from 1-2-73 and thus became tenant. The company went into liquidation. It was ordered to be wound up and on 23/1/76 Official Liquidator was appointed. The case of the plaintiff is that Official Liquidator i.e. respondent 2 was in arrears of rent from 1/2/76 to 31/3/80. The plaintiff, therefore, issued notice dated 28/7/97 claiming arrears of rent. Defendant 1 failed to pay the arrears and hence the instant suit came to be filed for eviction on the ground of non-payment of arrears of rent. The arrears claimed are from 1/4/77 to 31/3/80.
4. The case of defendant 1 was that the company informed him that the flat was surrendered to the plaintiff in 1972. When the director of the company was called upon to produce necessary documents including leave and licence agreement, he failed to produce them.
5. So far as defendant 2 is concerned, her case was that she was in occupation of the suit premises from 1972 to the plaintiff's knowledge. She contended that the agreement of leave and licence was a formal

agreement which was not to be acted upon. According to her the suit premises were occupied by one Kiran Nagarkar on tenancy basis and that after Nagarkar went, the premises were retained for her benefit. The company surrendered tenancy of the suit premises in her favour. She contended that she continued to pay rent and rent was accepted by the plaintiff. According to her she was the tenant of the plaintiff. Her alternative submission was that if it is held that there is no privity of contract between her and the plaintiff in that event she was a deemed tenant because she was the licensee of the company on 1/2/73. The trial court decreed the suit. The lower appellate court dismissed the appeal carried by defendant 2 and hence this writ petition.

6. I have heard at some length Mr. Godbole, learned counsel appearing for petitoner-defenant 2. He assailed the impugned judgment and decree on two counts. He firstly stated that the notice of demand dated 20/7/77 is not served on the Official Liquidator. There is no proof of service. Mr. Godbole pointed out that in the written statement the official liquidator has stated that the letter dated 28/7/77 was not received by him. Mr. Godbole contended that service of notice on the office bearers of a company which has gone in liquidation is not legal service. He submitted that on this count the suit must fail.

7. Mr. Godbole then contended that defendant 2 is the erstwhile employee of

the company. She was inducted in the suit premises by the company. The plaintiff has accepted the rent from her. The plaintiff has in his evidence stated that defendant 2 paid rent by cheques. Mr. Godbole submitted that, therefore, defendant 2 is a tenant of the plaintiff and in any case her case that she is a deemed tenant will have to be accepted.

8. I am unable to accept the submissions of Mr. Godbole. Sofar as service of demand notice is concerned, the plaintiff in his examination-in-chief has stated that demand notice was personally served on the office bearers of defendant 1. He has further stated that he came to know that the company had gone into liquidation, therefore, he served demand notice upon the official liquidator. Though official liquidator has stated in his written statement that he did not receive the demand notice, the plaintiff has produced acknowledgement of receipt of notice by defendant 1 i.e. the official liquidator. The said acknowledgement is on record and is at Exhibit.-B. In view of this, in my opinion, there is no substance in the contention that the demand notice was not served. Service on Official Liquidator will be good service. I concur with the courts below that as per Section 456 of the Companies Act, the official liquidator is the transferee of the bank and is empowered to institute the suit or defend the suit. After liquidation he takes control of the property and actionable claims to which the company is entitled. This argument must therefore, fail.

9. So far as the claim of defendant 2 that she is either a direct tenant of the plaintiff or that she is a deemed tenant is concerned, I find it to be a totally dishonest claim. Company's letter dated 9/2/72 addressed to the plaintiff is important. The company has informed the plaintiff that from 1/3/72 defendant 2 will take possession of the flat which is presently being occupied by Mr. Kiran Nagarkar. This indicates that the suit premises were taken for the occupation of the company's employees. Letter dated 18//12/72 which is also on record shows that company had asked for extention of contract and licence agreement upto April, 1973. The terms of the leave and licence agreement are also very important. They indicate that the suit premises were taken for the benefit of the employees. Defendant 2's letter dated 3/2/77 addressed to the advocate of the plaintiff is significant. In that letter she says that she has been in occupation of the suit premises and that if there are any arrears of rent she is prepared to pay them to the plaintiff, that she would like to meet the plaintiff in the office of the plaintiff's lawyer and discuss the matter with a view to negotiate some settlement, if possible. Thus comes out the real story. If defendant 2 was really a tenant nothing prevented her from making affirmative statement in this letter. There is not a word in this leter which would support defendant 2's claim of tenancy.

10. Besides in her evidence defendant 2 has admitted that she was occupying

the suit premises as a licensee of the company who was tenant of the plaintiff and she started making payment to the plaintiff from February 1971. She has submitted that she occupied the suit premises from March, 1972, after the premises were vacated by Kiran Nagarkar and she was in the employment of the company till January, 1974. This evidence shows that she is a service licensee in respect of the suit premises as she was in the employment of the company. Much is tried to be made of the fact that the plaintiff accepted cheque payment of some compensation amounts from defendant 2. However, the plaintiff has made it very clear in his evidence that he accepted the payment under the belief that defendant 2 was paying for the company. In my view, therefore, the trial court as well as the lower appellate court are absolutely right in coming to the conclusion that defendant 2's case is totally dishonest. There is no doubt that defendant 2 wants to usurp the premises occupied by her as an employee of the company. So far as the arrears of rent are concerned there is not much of challenge to that claim.

11. In view of this I find no illegality in the concurrent finding recorded by the courts below. No interference is necessary with the impugned judgment and hence the petition is rejected.

12. At this stage the learned counsel for the petitioner states that the petitoner is desirous of approaching the Supreme Court and hence she may be given

some time to vacate the suit premises. In the circumstances of the case the petitioner is given three months' time to vacate the suit premises on the petitioner and every adult member of her family filing usual undertaking in this court, with a statement therein, that in case within a period of three months the petitioner is unable to get any favourable order from the Supreme Court after three months, they will handover vacant, unencumbered and peaceful possession of the suit premises to the plaintiff. Undertaking to be filed within four weeks from today.

13. Certified copy expedited.

.....